STATE OF MICHIGAN

COURT OF APPEALS

DORIS PATTERSON and ROBERT PATTERSON,

Plaintiffs-Appellants,

v

JESSE CHAVEZ,

Defendant-Appellee.

UNPUBLISHED
July 17, 1998

No. 203034
Oakland Circuit Court
LC No. 96-519913 NI

Before: Sawyer, P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

In this pre-"tort-reform" automobile negligence action, plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant. The court found that as a matter of law, plaintiff's injuries did not amount to a serious impairment of body function, the threshold necessary for recovery of noneconomic damages under the Michigan no-fault insurance act, MCL 500.3135(1); MSA 24.13135(1). We affirm.

Plaintiff Doris Patterson alleges that she was injured as a result of an automobile accident that occurred on April 16, 1995, when she was broad-sided by defendant's vehicle. Plaintiff was allegedly thrown to the left side of the car, where she hit her head and left arm. The record in the instant case indicates that before the accident, plaintiff was receiving chiropractic treatment for hip and back problems. The day after the accident, plaintiff saw her chiropractor, Dr. Sheldon, and complained of pain in her left shoulder, arm, leg, and right hip. Dr. Sheldon treated her by performing "regular adjustments," with some additional work to her left shoulder. Plaintiff saw Dr. Sheldon a few times a week shortly after the accident and on an as-needed basis thereafter. Three weeks after the accident, plaintiff returned to her full-time work as a child day-care provider. Plaintiff alleges that she had to rely on her husband to provide assistance on a daily basis with lifting the children and with household tasks.

About a month after the accident, plaintiff was diagnosed with "cervical and lumbar myositis" and began physical therapy. Two weeks and seven visits later, plaintiff discontinued therapy. At the time of discharge from therapy, her therapist noted that plaintiff had reduced neck stiffness and that

"there was no pain at all." On November 26, 1996, Dr. Sheldon prepared a prognosis report wherein he stated that plaintiff's prior conditions were aggravated by the accident, that plaintiff continues to feel pain and discomfort and that plaintiff has trouble doing rehabilitative exercises, rising to walk after sitting, and lifting. Dr. Sheldon also indicated that he believed plaintiff has sustained a "15% permanent partial spinal impairment rated as 15% of the body as a whole" as a result of the accident.

The amendment to the noneconomic loss provision of the Michigan no-fault insurance act, MCL 500.3135; MSA 24.13135, took effect the day after plaintiffs filed this lawsuit. Therefore, we must apply *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986), the controlling precedent at that time.

Pursuant to *DiFranco* and its progeny, this Court must view the evidence in the light most favorable to the nonmoving party and determine whether: "(1) a material factual dispute exists as to the nature and extent of plaintiff's injuries and, (2) whether reasonable minds could differ regarding whether plaintiff had sustained a serious impairment of body function." *DiFranco, supra* at 38-39. Thus, summary disposition is proper when there is no genuine issue with respect to any material fact and reasonable minds could differ regarding the legal conclusions to be drawn from the facts. *Moll v Abbott Laboratories*, 444 Mich 1, n 33; 506 NW2d 816 (1993).

In order to meet the threshold of "serious impairment of body function" under *DiFranco*, a plaintiff had to prove that (1) the injuries he sustained in the accident impaired one or more body functions, and (2) that the impairment was serious. *Id.* at 39. The focus was not on the injuries themselves, but on how the injuries affected a particular body function. *Id.* at 67. To determine whether an impairment was serious, the following factors were to be considered: the extent of the impairment, the particular body function impaired, the length of time of the impairment, the treatment required to correct the impairment, and any other relevant factors. *Id.* at 69-70; *Owens v Detroit*, 163 Mich App 134, 138; 413 NW2d 679 (1987). The impairment need not have been permanent to be considered serious. *DiFranco, supra* at 69-70; *Richards v Pierce*, 162 Mich App 308, 315; 412 NW2d 725 (1987). Finally, in determining whether an impairment is serious, it is improper to focus on lack of absenteeism or wage loss. *DiFranco, supra* at 88.

The question whether plaintiff satisfied the no-fault threshold was ordinarily one for the trier of fact. If reasonable minds could differ as to whether a particular injury exceeds the tort threshold, the issue was one of fact to be resolved by the jury:

> The question whether the plaintiff suffered a serious impairment of body function must be submitted to the trier of fact whenever the evidence would cause reasonable minds to differ as to the answer. This is true even when there is no material factual dispute as to the nature and extent of the plaintiff's injuries. [*DiFranco, supra* at 38.]

However, where reasonable minds could not differ as to the seriousness or nonseriousness of the injury, the threshold issue is one of law for the court:

> in certain circumstances, the trial court should decide as a matter of law whether the plaintiff had, or had not, established a threshold injury. Such a decision could be made where "it can be said with certainty that no reasonable jury could view a plaintiff's impairment as serious. If the injury was "so minor" or of a "clearly superficial nature," summary disposition would be appropriate. [*Id.* at 51-52; *Gagliardi v Flack*, 180 Mich App, 62, 69; 446 NW2d 858 (1989) (citations omitted).]

On appeal, plaintiff argues that reasonable minds would differ as to whether the impairments she suffered were serious. Therefore, the issue was one of fact for the jury and the trial court erred when it decided the issue as a matter of law. We disagree.

We hold that reasonable minds could not differ regarding whether the facts presented in this case indicated that plaintiff sustained a serious body function as a result of the auto accident. A fifteen percent permanent partial spinal limitation is not sufficiently serious to meet the threshold. Compare *DiFranco*, *supra* at 67 ("a person who suffers a permanent seventy-five-percent limitation in back movement has clearly suffered a serious impairment of body function"). Plaintiff did not begin physical therapy until two months after the accident and had a total of seven treatments within the span of two weeks. At the time of discharge, although there was some stiffness, plaintiff was reported to have "no pain at all" and that her range of motion had improved. Plaintiff was never recommended for surgery or hospitalization as a result of the alleged accident. Finally, even before the accident, her prior back and hip problems were causing her difficulty in undertaking her daily activities as a child day-care provider. Accordingly, we find that reasonable minds could not differ on the fact that the accident did not cause plaintiff to sustain a severe impairment of body function as required under the no-fault act.

Affirmed.

/s/ David H. Sawyer
/s/ Martin M. Doctoroff

I concur in the result only.

/s/ Michael J. Kelly